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In the Supreme Court of the United States

OCTOBER TERM 1982

JOHN E. McKENZIE, ET AL.,
Petitioners,

versus

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the prosecutors' refusal to accept the return of a No True Bill by the grand jury, in direct contravention of the District Court's grand jury charge, together with other acts of overreaching, did constitute misconduct sufficient to warrant dismissal of the indictment that was subsequently returned.

2. Whether the decision of the Court of Appeals condoning the challenged misconduct grants to prosecutors such excessive discretion that it encroaches on the independence of the grand jury in violation of the Fifth Amendment to the United States Constitution.

3. Whether the decision of the Court of Appeals overlooked a crucial issue when it failed to address the petitioners' contention that they suffered actual prejudice since the result of the prosecutors' misconduct was the return of a True Bill by the grand jury.

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The petitioners John E. McKenzie, Dale Bonura, Stephen Farrar, Stephen Reboul, Ronald R. Brink, Thomas R. Woodall and Richard LeBlanc respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on June 18, 1982.

OPINION

The opinion of the Court of Appeals (Appendix B, *infra*, p. A-24) is reported in 678 F.2d 629. The opinion of the District Court for the Eastern District of Louisiana (Appendix A, *infra*, p. A-1) is reported in 524 F. Supp. 186.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on June 18, 1982. A timely petition for rehearing *en banc* was denied on August 30, 1982 and this petition for certiorari was filed within 30 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Amendment V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury,...

United States Code, Title 18 §2: Principals

United States Code, Title 18 §241: Conspiracy against the rights of citizens

United States Code, Title 18 §242: Deprivation of rights under color of law

See Appendix D, *infra*, p. A-39 for text of statutes.

STATEMENT OF THE CASE

Allegations of police brutality followed the investiga-

tion of the murder of a New Orleans police officer on November 8, 1980. Months later, amid intense public clamor, a federal grand jury was empaneled by the District Court for the Eastern District of Louisiana to scrutinize police conduct surrounding the tumultuous course of events.

The grand jury heard testimony from December, 1980, until July, 1981, finally indicting seven New Orleans homicide detectives on charges of violating 18 U.S.C. §2 and 18 U.S.C. § 242. These police officers were alleged to have beaten or otherwise intimidated persons thought to be witnesses of the murder. The seven were also charged under 18 U.S.C. § 241 with conspiracy to accomplish the alleged civil rights violations.

On August 18, 1981, the District Court granted a defense motion forcing the government to disclose portions of the grand jury transcript. The revealed portion reported the dialogue between the prosecutors and grand jurors occurring over the last two days of the grand jury deliberations, July 8 and 9, 1981.

On August 27, 1981, the petitioners moved to dismiss the indictment due to unconstitutional prosecutorial abuse of the grand jury proceedings. On September 14, 1981, the District Court granted the motion, dismissing the indictment because the defendants had been denied their constitutional right to be brought to trial only through fair and unbiased legal process.

The government appealed. On June 18, 1982, a panel for the Fifth Circuit Court of Appeals ordered the District Court's dismissal vacated. The Court of Appeals held that the prosecutors' misconduct was error, but not reversible error, and that the indictment should not have been dismissed because the challenged misconduct had not overborne the independent will of the grand jury. The Court reasoned that the petitioners were not prejudiced by the prosecutors' concededly erroneous misconduct.

The transcript of the grand jury deliberation during the final two days of its meeting reveals several instances of unusual prosecutorial misconduct. The major activities, crucial to a complete analysis of the issues herein are summarized as follows:

1. The prosecutors delivered an impassioned "closing argument" to the grand jury, containing numerous appeals to considerations other than the merits of the indictment;

2. Upon the grand jury's return, and with all parties aware that a decision had been made, the prosecutors misstated the law, refusing to accept the intended No True Bill;

3. This misleading and effective rebuff of the grand jury's attempt to conclude its work was followed by a protracted dialogue, in which the prosecutors questioned, coaxed, and pressured the grand jurors, trying to salvage

some acceptable indictment. This invasion into the secret deliberations and thought processes of the jurors was accompanied by repeated pleas from the prosecutors, urging the grand jurors to consent to reconsideration of the indictment. (See Trial Court's description of misleading and prejudicial comments and actions in Appendix A, *infra*) Following this course of government intervention and participation in the grand jury deliberations, a True Bill was returned.

The specific facts and dialogue are set out in Appendix F, *infra*, p. A-44.

REASONS FOR GRANTING THE WRIT

1. The decision below raises important questions of constitutional law regarding the integrity of the grand jury.

2. The Supreme Court has not clearly defined the permissible scope of proper prosecutorial conduct before the grand jury.

3. The case focuses current critical issues of alleged prosecutorial abuse and police brutality on a background of racial and political conflict. These issues are of intense public concern.

4. The decision below erroneously and dangerously expands the limits of allowable prosecutorial misconduct

before the grand jury, calling for exercise of the Court's supervisory powers over the federal judiciary to establish standards by which lower courts may be guided.

5. The decision below articulates an unrealistic and unworkable standard for proving prejudice to defendants claiming prosecutorial overreaching.

Because these five reasons overlap and interrelate, they are here developed and explained together. The important questions of constitutional law include, of course, questions of the permissible scope of prosecutorial conduct. Likewise, the concurrent intense public interest in racial harmony, as well as in peaceful citizen-police relations, adds urgency to the defendants' request for a hearing. Finally, the decision below constructs an unrealistic judicial standard and significantly loosens the reins on excessively aggressive prosecutors. The decision affords poor guidance to courts below and is likely to promulgate future injustice to the countless subjects of federal and state prosecution.

The hallowed reverence reserved in the common law for the grand jury is denigrated when prosecutors violate the resolute independence of that institution. That the grand jury truly function as a safeguard against government overreaching is at the core of the Fifth Amendment guarantee that a person may be prosecuted for serious crimes only by indictment of a fair and unbiased grand jury. *United States v. Dionisio*, 410 U.S. 1, 93 S.Ct. 764, 35

L.Ed.2d 67 (1973); *Wood v. Georgia*, 370 U.S. 375, 82 S.Ct. 1364, 8 L.Ed.2d 569 (1962); *Costello v. United States*, 350 U.S. 359, 76 S.Ct. 406, 100 L.Ed 397 (1956).

The transcript of the final days of the grand jury proceedings starkly reveals in unambiguous dialogue that government prosecutors deceived the jurors regarding critical issues of fact and law, refused to accept an intended no-true bill, and then bullied the jurors into revealing details of their secret deliberations. This misconduct cumulated with previous appeals to prejudice, misstatements of law, and unbalanced presentations of evidence to produce an indictment, when one had not been forthcoming, thus substituting the prosecutor's will for that of the grand jury. (See Trial Court's description of the various abusive comments and actions in Appendix A, *infra*)

The prosecution concluded its presentation of the case with an impassioned "closing argument" that was a blatant appeal to prejudice. (See Appendix F, p. A-44 for text of the speech).

The remarks urged the jury to approve the indictment because all four prosecutors, including *the* United States Attorney, considered the charges justified. The harangue also described police officers in highly prejudicial terms.

When the grand jury concluded its deliberation, it

announced to the prosecutors its intention not to indict and asked if the group was to report their decision to the magistrate. The obviously dumbfounded presiding prosecutor uttered a response that has since been termed "incredible" by both courts below.

Mr. Johnson:

> "We have just encountered a point of law that I have never encountered before which is less than twelve grand jury votes." (R. X 176, lines 1-15).

This misstatement of fact and law, intentional or otherwise, was a refusal to accept the grand jury's decision. It was followed by intense probings and coaxing, in an ultimately successful effort to persuade the jurors to reconsider.

The Trial Court cogently observed in its opinion that both the Court and one of the prosecutors had specifically instructed the jurors, prior to their deliberation, that a vote of less than 12 members for an indictment should be endorsed "Not a True Bill" and returned to the Court. The Trial Court appropriately characterized the prosecutors' refusal to accept the jury's decision as "astonishing" and "incredible."

The Trial Court continued:

> The prosecutors then participated in the deliberations of the grand jury, in clear violation of the law. At the very least, all three of the government

attorneys then present participated in the grand jurors' deliberations concerning whether they wished to consider another indictment, different from that as to which they had voted a no true bill. After the deadlocked vote was announced, what occurred both on that evening and the next day was protracted deliberation, with the prosecutors and the jury participating—in effect an indictment negotiated by the government attorneys. (Appendix A, *infra*, p. A-18.)

Fundamental questions of constitutional significance arise:

1) May a prosecutor properly refuse to accept an announced decision of a grand jury?

2) May a prosecutor properly deceive a grand jury as to the effect of its decision?

3) May prosecutors properly urge grand jurors to disclose the content of their deliberations, after a decision not to indict has been announced?

4) Do these actions invade and vitiate the grand jury's independence?

5) Do these actions substitute the will of the prosecutors for that of the grand jury?

6) Can a prosecutors' refusal to accept an announced No True Bill not prejudice the intended defendants?

In its opinion below, the United States Court of Appeals for the Fifth Circuit condoned such government behavior, reasoning that the defendants had not been prejudiced by the concededly improper conduct. The Court, in its opinion, made no reference to the defendants' argument that they had suffered the greatest possible prejudice—that the indictment was *caused* by the prosecutorial misconduct. The precedential effect of a holding that rejects such a common sense appreciation of prejudice would be devastating to future victims of government abuse.

Additionally, the Court of Appeals' analysis refused to address the defendants' key argument that each act of abuse must be viewed as a part of the overall presentation to the jurors. Contrary to this argument, the Court below isolated each incident of misconduct, separately adjudging each to be insufficient to overbear the will of the grand jury. Again, this approach is unrealistic. Each act must be considered in the context of preceding displays of control and developing perceptions of authority. In this case, the continued, coercive acts of the prosecutors culminated in pressure on the final two days. While some of the remarks and actions may seem innocuous alone, they all contributed to the ultimate coercion.

Moreover, when cast on the background of previous case law (See Appendix E, *infra*, for specific cases) the Fifth Circuit's condonation of this extraordinary deception and bullying sends an unmistakable message to prosecutors that nothing short of physical abuse or perjury

will trigger judicial sanctions.

The contours outlining permissible government conduct are vague and this Court should seize this opportunity to articulate clear limits, for the benefit of government and citizen alike.

Furthermore, this case presents a particularly appropriate vehicle for providing such guidance because of its unique facts. The defendants are white New Orleans homicide detectives who are charged with violations of the civil rights of black citizens. At the time of the grand jury deliberations, tension ran high in New Orleans, where a new black majority had recently elected its first black mayor.

A state grand jury investigating the same alleged violations returned a No True Bill prior to the federal indictment. Charges and counter-charges of political and racial motivation for the continued prosecution flourished. Media expectations of riots in the city were widespread at the peak of the controversy.

The interests of justice are promoted when the law is clear and when critical issues are fully addressed and decided. Such has not occurred in this case. The Fifth Circuit did not confront the crucial issues and its opinion is both unclear and dangerously expansive. Neither the public nor lower courts have been well served. The case begs for review.

As Mr. Justice Brandeis admonished in his now famous dissent:

> "[t]he greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding." *Olmstead v. United States*, 277 U.S. 438, 479, 48 S.Ct. 564, 573, 72 L.Ed. 944 (1928).

CONCLUSION

For these reasons, a writ of certiorari should issue to review judgment and opinion of the Fifth Circuit.

Respectfully submitted,

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